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Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,

Petitioner,

—against—

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and HONORABLE DAMON J. KEITH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, *AMICI CURIAE*

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Interest of *Amici**

The American Civil Liberties Union is a nationwide non-partisan organization of over 160,000 members engaged solely in the defense of the Bill of Rights. The American Civil Liberties Union of Michigan is an affiliate of the American Civil Liberties Union and functions within Michigan where this case arose.

* Letters of consent to the filing of this brief have been filed with the Clerk.

During its fifty-one year existence, the ACLU has been particularly concerned with protecting the rights of freedom of expression and privacy, safeguarded by the First and Fourth Amendments to the Constitution. The powers asserted here by the government would gravely impair those essential liberties and would severely undermine "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."

Questions Presented

1. Does the Attorney General have the constitutional authority to eavesdrop electronically on Americans he considers threatening to domestic security, without being subject to any significant judicial control?

2. Should *Alderman* v. *United States*, 394 U.S. 165 (1969) be overruled?

Constitutional Provision and Statute Involved

The pertinent provisions of the Fourth Amendment and of the Omnibus Crime Control and Safe Streets Act of 1968 appear in the Appendix to the Brief for the United States, and in Appendix A hereto.

Summary of Argument

I.

A. The Government seeks to cast the questions involved herein in unduly narrow terms. According to the Government, this case now* involves:

(1) "solely" the absence of prior judicial scrutiny (Govt. Br. 2, 12-13); (2) "a lesser invasion of privacy than a physical search of a man's home or his person" (Govt. Brief 13); and (3) "no novel principle of constitutional law, but rather the application to these facts of existing doctrine" (Govt. Br. 13).

B. The Government's position obfuscates what is truly at stake: the power to eavesdrop by electronic devices on a huge range of people distrusted by the Attorney General, with virtually no judicial or other scrutiny except sporadically, and then only superficially.

1. Judicial review will rarely take place, since this surveillance is allegedly not for criminal prosecution but only for intelligence purposes, and will rarely come to light.

2. When judicial review occurs, the Government would limit it to virtually a rubber stamp.

3. The range of people subject to such surveillance under both the congressional standard purportedly relied

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* The brief on the merits concededly involves "a narrowing of" the question presented by the petition but is allegedly "covered by" it (Govt. Br. 2, n. 1). References to "Govt. Br. ——" are to the brief for petitioner. References to "App. ——" are to the Appendix to the Petition for Certiorari.

upon by the Government in 18 U.S.C. §2511(3), and as evidenced by past practices, is broad enough to include virtually any critic of the established "structure" of government; the length of time involved in such surveillance is very great; the record shows that this power has not in fact been used sparingly. Indeed, the Government's figures showing a "closely limited" number of surveillances are substantially incorrect in several vital respects.

4. Allowing an exemption from constitutional limitations for electronic surveillance justifies similar exemptions for other types of investigative devices and techniques, since there is no rational basis for limiting such an exemption to electronic surveillance.

C. Granting such a power would seriously encroach not only upon the Fourth Amendment but also upon the First Amendment.

1. Electronic surveillance seriously threatens Fourth Amendment values, far more than a conventional search. For this reason, Congress and this Court have required *more* procedural prerequisites to electronic surveillance than to the conventional search, not fewer as the Government proposes.

2. Electronic surveillance seriously threatens First Amendment values and interests, particularly when employed against political dissidents, as it so often has been.

D. There is no justification in law or in reason for granting the Attorney General such dangerous power over the lives and thoughts of Americans.

1. There is no judicial precedent for such powers in the area of domestic "threats"; indeed, this Court has expressly denied the Executive such power. Decisions in the field of foreign affairs are not germane; the Congress and the Attorney General have both recognized the difference between the two spheres.

2. Congress has not authorized such a power in 18 U.S.C. §2511(3).

3. Executive memoranda are neither controlling nor even pertinent, since they were based on different problems in different settings.

4. Sound policy counsels against the grant of such power.

a. A vague and talesmanic invocation of "national security" should not suffice to impair the fundamental values incorporated in the First and Fourth Amendments.

b. No showing has been made that the judiciary is either too incompetent or too unreliable to screen such surveillances, or that the Attorney General is uniquely so qualified.

c. The benefits of "uniformity" and "centralization" are unproven and dubious.

II.

A. *Alderman* v. *United States*, 394 U.S. 165 (1969), is sound law and nothing that has occurred since that decision justifies modifying it in any way.

B. *Alderman* is based on the Fourth Amendment and not on this Court's non-constitutional supervisory power.

ARGUMENT

Introduction

Almost 100 years ago, Mr. Justice Miller wrote: "No man is so high that he is above the law . . . . All officers of the government . . . are creatures of the law and are bound to obey it." *United States* v. *Lee*, 106 U.S. 196, 220 (1882). In recent years, the rule of law has been tested as never before. The nation is still torn by bitter dissension over a war that has cost us much blood, treasure and domestic tranquility; blacks, Mexican-Americans, Puerto Ricans and others have been embittered by long years of oppression; many of our young people remain alienated and disaffected; unemployment remains high.

At such times, the rule of law becomes both more vital and more vulnerable. The temptation to override it, particularly among the powerful, is often irresistible, as the Alien and Sedition Acts, McCarthyism, and the Palmer raids so tragically demonstrate; the temptation among the disaffected to ignore it is equally great.

This case brings before this Court one of the most serious challenges to the rule of law from the governmental side: an attempt by the Executive Branch and the Attorney General to invade free speech, association, and privacy by electronic spying, solely upon the Attorney General's secret subjective judgment that it is "not unreasonable" to do so, and without permitting any outside check on that judgment.

This demand has few, if any, parallels in our history. Ignoring our traditions of checks and balances, limited delegated powers, and clear Fourth and First Amendment

restraints, the Government demands the right to apply the most penetrating and unlimited electronic spying devices on all individuals and groups who, in the Attorney General's eyes, appear "dangerous." No nation can survive such a power and remain free; no democracy can function where dissent and free association are so jeopardized; no society can allow the Executive so gross an exemption from "those wise restraints that make men free" without teaching its people that the mandate of the rule of law runs in one direction only.

I.

The Government claims the right to eavesdrop electronically on political dissenters without any external scrutiny or other meaningful controls.

A. The Government's Statement Minimizes the Issues Herein.

In its petition for certiorari, the Government submitted the following question for review by this Court:

> "Whether electronic surveillance is reasonable within the meaning of the Fourth Amendment when it has been specifically authorized by the President, acting through the Attorney General, to gather intelligence information deemed necessary to protect against attempts to overthrow the government by force or other unlawful means or against other clear and present dangers to the government's structure or existence." (Petition 2.)

In its brief on the merits, the Government has restated its position much less sweepingly, though claiming merely

a "narrowing of the question." Asserting that electronic surveillance involves a "*lesser* invasion of privacy than a physical search of a man's home or his person," (Govt. Br. 13; emphasis added), the Government frames the issue as if it involved only another application of the principle that some searches need not be preceded by a warrant. Thus, concludes the Government, "this case . . . involves no novel principle of constitutional law but rather the application to these facts of existing doctrine." (*Ibid.*)

The Government deserves an *A* for effort, but an *F* for correctness. Its attempt to reduce a mountain to a molehill is defeated by the most obvious facts about electronic eavesdropping and by the virtually absolute exemption from judicial or other scrutiny that the Government seeks. Judge Edwards wrote of the Government's contention below, "the sweep of the assertion of the Presidential power is both eloquent and breathtaking." App. 19. The claim here is no less sweeping.*

B. The Court of Appeals Correctly Analyzed the Enormous Scope and Impact of the Government's Claim.

The backbone of the Government's argument is that the reasonableness of a search depends on "a weighing of the competing interests involved" (Govt. Br. 11) and that "in balancing the competing interests involved . . . the overhearing of a telephone conversation . . . involves a lesser invasion of privacy than a physical search of a man's home or his person" (Govt. Br. 13). If the Government has weighed some of the factors wrongly, then the equation supporting its argument collapses.

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* Indeed, the Court of Appeals agreed to consider the case on the merits because "great issues are at stake for all parties concerned." App. 15.

And the Government has weighed wrongly, tragically so. Indeed, it is appalling to have it demonstrated so clearly how little weight the Government attaches to privacy and all that it means for a free society.

Apart from the fact that the typical electronic surveillance involves not merely "a telephone conversation" (regardless of who the defendant is) but many thousands,* electronic surveillance is generally acknowledged to be one of the most dangerous and intrusive threats to privacy. It is the prime example of Mr. Justice Brandeis' forebodings in *Olmstead* v. *United States*, 277 U.S. 438, 473 (1928) that "discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Even where circumscribed within the confines of 18 U.S.C. §2500 *et seq.*, it represents an intensive and extensive invasion of private speech and thought with almost no parallel. When a continuous tap is placed on a telephone, the eavesdropper almost inevitably hears all the conversations of everyone who talks on that line whether the subject calls out from the tapped number, calls in to that number, or is called by someone using that phone, and no matter how irrelevant or privileged the communication. A room microphone is even more intrusive, for it can catch every intimate, irrelevant, or privileged utterance of each person in the room or area bugged, whether it be the bedroom, see *Irvine* v. *California*, 347 U.S. 128 (1954), or the office, *Goldman* v.

* See, *e.g.*, Report of the Administrative Office of the United States Court of Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1970 to December 31, 1970, Table 4 (1971) (average number of conversations overheard per federal intercept was 821).

United States, 315 U.S. 129 (1942) or a public telephone. Because these devices intrude so deeply and so grossly, they discourage people from speaking freely; as Mr. Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where the only sure way to guard one's privacy "is to keep one's mouth shut on all occasions." *Lopez* v. *United States,* 373 U.S. 427, 450 (1963).

This is why this Court said in *Berger* v. *New York,* 388 U.S. 41, 63 (1967), "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." See also *id.* at 56, 68, 69. This is why Congress limited the right to eavesdrop electronically so much more than it limited conventional searches. Indeed, the whole elaborate panoply of 18 U.S.C. §2500 *et seq.* is a recognition of the uniquely dangerous nature of electronic surveillance. Thus, for example, no warrant may be issued for electronic surveillance unless the Court is convinced that no other practical means exist to obtain the necessary information, 18 U.S.C. §2518(1)(c), a requirement not imposed for more conventional searches.

C. The Government Seeks to Avoid Any Judicial or Other Check on Its Electronic Surveillance.

1. *National security surveillance will rarely be revealed.*

Even if the weight assigned by the Government to the effect of electronic surveillance were correct, the freedom from restraint sought by the Government goes far beyond that constitutionally permitted for a conventional search. For the issue is not merely the point in time at which the Government must obtain a warrant, but *whether* it

must do so at all. The Government is not seeking merely to avoid the necessity of having to obtain a warrant *before* it taps or bugs, as in *Carroll* v. *United States*, 267 U.S. 132, *Schmerber* v. *California*, 384 U.S. 757, or *Warden* v. *Hayden*, 387 U.S. 294, but rather to avoid any judicial oversight whatsoever.

Unless the Government is required to get a warrant in advance or shortly thereafter, compare the "emergency" provision, 18 U.S.C. §2518(7), its eavesdropping will rarely ever be scrutinized by a court. Unlike a conventional search which will inevitably be disclosed immediately, electronic surveillance is surreptitious and will rarely come to light unless voluntarily or accidentally revealed in an occasional criminal prosecution (Govt. Br. 21). Since national security surveillance is used primarily for intelligence and not for prosecution, there is little likelihood indeed that it will ever come to light. Thus, whereas the kinds of searches involved in *e.g.*, *Carroll*, *Schmerber* and *Warden* v. *Hayden*, will ultimately be subject to some check, as will the electronic surveillance pursuant to court order, the national security surveillance almost never will be.*

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* The point was made very clearly by the Government in the *Government's Reply Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint* (dated 5/18/71), pp. 7-8, in *Kinoy* v. *Mitchell*, 70 Civ. 5698, S.D.N.Y., where it described the electronic surveillance encompassed by 18 U.S.C. §2500 *et seq.*, including §2511(3) as follows:

> The very first words [of §2511(3)] clearly exempt national security wiretaps from the necessity for connection with the specific crimes listed in Section 2516, from the specificity, probable cause, and duration limitations of Section 2518, from the inventory provision of 2518(8)(d) and indeed from court supervision other than when offered in a criminal prosecution.
>
> It can be seen that the statutory scheme is one of absolute secrecy for national security wiretaps, limited secrecy for authorized wiretaps, and no secrecy permitted for banned private wiretaps.

2. ***Even where the national security surveillance does come to light in a criminal prosecution, the Government would make the judiciary virtually a rubber stamp.***

Repeatedly stressing the alleged incompetence of the judiciary to review "the judgment involved in determining whether to authorize a particular surveillance" (Govt. Br. 22, 24-26, 33), the merits of which assertion will be discussed below, the Government would limit judicial review to determine whether

> "the determination that the proposed surveillance relates to a national security matter is arbitrary and capricious. . . . . The Court should not substitute its judgment for that of the Attorney General on whether the particular organization, person or events involved has a sufficient nexus to protection of the national security to justify the surveillance" (*id.* at 22).

The court may thus look only to whether national security is somehow involved and under the least demanding of standards. It may not even consider whether the particular person whose privacy is affected is entitled to be free from such privacy. Indeed, given the Government's distrust of judicial competence in this area, it is difficult to see how the courts can apply even so loose a standard as "arbitrary and capricious."

3. ***Congressional supervision is equally limited.***

Nor is Congress given any greater role. There is no provision for any formal oversight and the Government has done nothing to facilitate any kind of systematic congressional oversight of the "reasonableness" of such surveillance.

D. The Range of Possible Targets of Such Surveillance Is Virtually Unlimited, and the Amount of Such Surveillance Far Exceeds That Conceded in the Government's Brief.

1. *The range of possible targets of such surveillance is virtually unlimited.*

Not only does the Government claim the right to be free from virtually all judicial limitations, but it acknowledges no limitation on *who* may be eavesdropped upon.

In the first place, we are given little or no indication of what kinds of persons or organizations may be the targets of such eavesdropping. The affidavit in this case, for example, says only that the surveillance is

> "being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government" (Govt. Br. 3).

Interestingly enough, there is no reference to violence here, despite the many casual references in the Government's brief to "sabotage," *id.* at 18 "actual acts of insurrection" (*id.* at 15), "protection of the fabric of society itself" (*id.* at 14), "threats to overthrow," (*id.* at 17), and bombings (*id.* at 18).

The Government relies on the language of §2511(3) which refers to those who would "overthrow the government by force or other unlawful means or against any other clear and present danger to the structure or existence of the government."

Such a class is frighteningly indefinite. By its own terms, it goes beyond those who would engage in unlawful activity and includes *all* who seek major changes in the "structure

. . . of the government" whether from the right, left or center. Taken literally, this can include those who would change the Electoral College system or would reverse the Supreme Court's apportionment or segregation decisions. As Mr. Justice White said of a similarly broad statute in *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964):

> "The State labels as wholly fanciful the suggested possible coverage of the two oaths. It may well be correct, but the contention only emphasizes the difficulties with the two statutes; for if the oaths do not reach some or any of the behavior suggested, which specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin?
>
> "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions . . . . *Well-intended prosecutors and judicial safeguards do not neutralize the vice of a vague law.*" (Emphasis added.)

The breadth of the category has been noted by one of the leading experts in this field, who was the chief architect of 18 U.S.C. §2500 *et seq.*, G. Robert Blakey, Chief Counsel, Subcommittee on Criminal Laws and Procedures, in a Memorandum to Senator John McClellan, reprinted in 117 Cong. Rec. S6479 (May 10, 1971 daily ed.). Under the heading "Definitions of Key Terms," he included *inter alia*, "La Cosa Nostra," and added that such surveillance is "sometimes used to determine the influence of extremist groups in other legitimate organizations (civil rights or peace)." The prime example of the latter is of course the wiretapping of

Martin Luther King, Jr., which was apparently undertaken for fear of Communist influence on Dr. King. See Navasky, *Kennedy Justice* 135-55 (1971).

The likelihood of such widespread surveillance has been confirmed many times. Martin Luther King, Jr. and Elijah Muhammed are but two of those whom the Government has admitted spying upon under this power. There are widespread revelations of military spying on those who have attended anti-war rallies, demonstrations, and the like, some of which was "at the request of the Justice Department," according to Assistant Secretary of Defense Daniel Z. Henkin on national television. Buffalo Evening News, December 1, 1970, p. 1, col. 1. Reports of outrageous syping of people not liked by the F.B.I. and/or the Attorney General in earlier years are numerous. See Theoharis and Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception,* 14 Wayne L. Rev. 749, 760-61 (1968) (Mrs. Roosevelt, John L. Lewis, Bureau of Standards Director Edward Condon, etc.).

Because of the secrecy of these surveillances, it is impossible to know just how far into ordinary political activity they extend—the revelations with respect to Martin Luther King, Jr. and of military spying in Illinois and elsewhere are hardly reassuring. But the vagueness of this category permits this 1984-type spying on a huge range of people.

Even if the kinds of persons or organizations covered by the Government's conception of threats to "national security" were clearer, the number of totally innocent people that would be overheard would still be huge. This surveillance is allegedly for intelligence purposes, not for investigation of specific criminal conduct. According to

experts, including the Federal Bureau of Investigation and Mr. Blakey, intelligence investigations are intended to monitor both criminal and non-criminal associates of suspected persons or organizations, and criminal and non-criminal activities. In his memorandum to Senator McClellan, Mr. Blakey noted:

> "Note, too, that since the emphasis is on the prevention of harmful activity rather than the punishment of those who have already caused harm, police action in these areas tends to cover more people for longer periods of time under less precise standards than conventional criminal investigation." 117 Cong. Rec. S6477 (May 10, 1971 daily ed.). See H. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 Mich. L. Rev. 455, 468-71 (1969).

It is perhaps in recognition of this, that the Government strongly opposes any effort by the courts to review the Attorney General's determination that "the particular organization, person or event has a sufficient nexus to protection of the national security to justify the surveillance" (Govt. Br. 22).

2. *The extent of national security surveillance is greater than that conceded by the Government's Brief.*

In order to support its contention that the Attorney General can be trusted to make such delicate determinations, the Government stresses that:

> The Attorney General personally authorizes each national security surveillance, and does so only when he concludes that the information to be obtained

thereby is essential to the protection of the government. One result of this careful and personal review by the Attorney General is that the number of such surveillances is closely limited; indeed, in recent years it has significantly declined. The number of warrantless "national security" telephone surveillances operated by the Federal Bureau of Investigation in the past ten years has decreased: 1960-78; 1961-90; 1962-84; 1963-95; 1964-64; 1965-44; 1966-32; 1967-38; 1968-33; 1969-49; 1970-36. See, *e.g.*, Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 87th Cong., 2d Sess. 345 (January 22, 1962); Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 88th Cong., 1st Sess. 491 (January 29, 1963); Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 91st Cong., 2d Sess. 754 (February 17, 1970).

These statistics are both inaccurate and misleading in at least three respects.

1. These figures seem to state the total number of such surveillances for the year. In fact, they do not, but only the total number of telephone surveillances in operation *as of a particular date,* generally the date of FBI Director J. Edgar Hoover's testimony. The point was made very clearly in the Government's brief in the court below where it described these same figures as "the steadily decreasing number of warrantless 'national security' telephone surveillances operated by the Federal Bureau of Investigation *at the time of the Congressional hearings or appropria-*

tions in each of the past ten years. . . ." Supp. Memorandum for Petitioner, p. 10, n. 3 at p. 11. The actual totals appear in subpara. 3 below.

2. These figures apply only to *telephone* surveillances, which the Government here also seeks to have authorized. Very few figures for the microphone surveillances have been made available, but at some periods, they were not much fewer than telephone taps. For example, on May 25, 1961, Assistant Attorney General Herbert J. Miller, Jr. wrote Senator Ervin that on February 8, 1960 there were 78 telephone taps in operation and that "The Federal Bureau of Investigation has 67 of these [electronic listening] devices in operation," apparently on May 25, 1971, the date of the letter. The letter is reprinted in Navasky, *Kennedy Justice* 88 (1971).

3. The actual number of taps and bugs for recent years, *i.e.*, June-December 1968, calendar year 1969 and calendar year 1970 and the highest number in operation at any one time during those years appears in correspondence between Senator Edward M. Kennedy and the Department of Justice, released on December 17, 1971 and reprinted in Appendix B hereto. That correspondence contains the following information:

"*June 19 to December 31, 1968*

Telephone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	50

Microphone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	6

Calendar Year 1969

Telephone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	81

Microphone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	13

Calendar Year 1970

Telephone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	97

Microphone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	16

The annual totals set forth above can be misleading in that they reflect the total installations authorized or in place during the periods described. The total maximum number of surveillances in operation at any one time during the periods described are as follows:

June 19 to December 31, 1968

Telephone Surveillances	45
Microphone Surveillances	6

Calendar Year 1969

Telephone Surveillances	59
Microphone Surveillances	5

Calendar Year 1970

Telephone Surveillances	56
Microphone Surveillances	6"

Letter of March 1, 1971 from Asst. Atty. Genl. Robert C. Mardian to Senator Edward M. Kennedy.

Assistant Attorney General Mardian refused to break these down into foreign and domestic surveillances. Letter of April 23, 1971, in Appendix hereto. It should be noted that in 1969 and 1970, the Attorney General had installed but 30 *court-ordered* electronic surveillances in 1969 and 180 in 1970. See 1969 and 1970 Reports of the Administrative Office of the United States Courts on court-ordered electronic surveillances. Obviously, there has been a great

deal of such national security eavesdropping, and the privacy of vast numbers of people has been invaded.

E. If This Exemption From Constitutional Restrictions Is Granted, There Is No Rational Basis for Not Granting a Similar Exemption From Other Constitutional Protections.

The Government's argument for dispensing with conventional constitutional protections deals only with electronic eavesdropping. But can such an exemption be limited to electronic surveillance or investigation? How can it not logically extend to other forms of obtaining intelligence such as entering and searching a person's or group's home, office or desk without a judicial warrant? See *Gouled* v. *United States*, 255 U.S. 298 (1921); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Why does it not also include detention for investigation of groups or individuals? detention or arrest in order to remove a person or organization from circulation? See *Korematsu* v. *United States*, 323 U.S. 214 (1944). Or, taking property forcibly from a "dangerous" person or group? See *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). And in all these cases, without permitting judicial review of whether the "particular organization, person or event has a sufficient nexus to protection of the national security to justify the" official action. By what rationale can these be distinguished from the activities defended here by the Government?

* * * * *

These then constitute the true dimensions of the Government's position—a demand for a vast, lengthy unsupervised and unchecked invasion of the privacy (and implicitly, other rights) of many, many people having only the remotest link with anything in any way criminal or even wrong.

II.

The Government's demand is inconsistent with the Fourth and First Amendments.

A. The Government's Demand Is Inconsistent With the Fourth Amendment.

The most recent utterance of this Court on the warrant requirement speaks directly to the issue at hand. In *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), this Court found unacceptable a search based solely on an authorization by "the chief 'governmental enforcement agent' of the State—the Attorney General. . . ." 403 U.S. at 450. The Court squarely rejected a claim that the Attorney General "did in fact act as a 'neutral and detached magistrate,'" *ibid.*, a claim similar to that presented here (Govt. Br. 19-28). And in rejecting the other justifications proposed by the State of New Hampshire for dispensing with a warrant, Mr. Justice Stewart said for the Court, in words directly applicable to this case:

> "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption' . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' *In times of unrest, whether caused by crime or racial conflict or fear of internal subversion,*

this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." 403 U.S. at 454-55 (footnotes omitted, emphasis added).

The Government merely cites *Coolidge* once in passing, Govt. Br. 19 n. 8, and instead relies on two lines of authority for its claim that it is exempt from the warrant and other Fourth Amendment requirements: (1) in part, the Government relies on the Court's reservation of the national security situation and on Mr. Justice White's concurrence in *Katz* v. *United States*, 389 U.S. 347, 358 n. 23, and 363-64 (1967), a case that reaffirmed the warrant requirement in other respects; (2) in part, the Government relies on cases in other situations such as border searches, entry into government buildings, welfare, and immigration (Govt. Br. 12), as well as certain other law enforcement situations. (*Id.* at 12 n. 3.) Neither offers the Government much support.

The reservation of the question of warrantless surveillance by Mr. Justice Stewart in his *Katz* opinion for the Court, 389 U.S. at 358 n. 23, and his concurrence in *Giordano* v. *United States*, 394 U.S. 310, 314-15 (1969), which

refers to Mr. Justice White's concurrence in *Katz* and in *Berger*, 388 U.S. at 112-18, all make it clear that both he and probably Mr. Justice White, were referring solely to *foreign affairs* eavesdropping, not domestic. For the view that there is no exemption even in foreign matters, see Douglas J., concurring in *Katz*, 389 U.S. at 359-60.

The distinction between the two areas will be discussed at pp. 32-33 below.

Cases from other situations offer the Government little more. A customs search is an historically sanctioned exception, that has increasingly come under fire. See generally Comment, *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007 (1967). Searches of persons occasionally entering government buildings are a far cry from intensive and lengthy electronic eavesdropping of someone in his own home or office. Welfare searches without a warrant were justified in *Wyman* v. *James*, 400 U.S. 309, 318-24 (1970) on the ground that the community had a right to know whether the beneficiaries of public funds were spending those funds in accordance with community intentions, especially where children are involved. In *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), a warrant from a neutral magistrate *was* insisted upon. And immigration matters have always been *sui generis*, since aliens have always had fewer rights than citizens. See opinion below, App. 22-23. It should also be noted that in *Abel* v. *United States*, 362 U.S. 217 (1960), the issue of whether a warrant was necessary and what kind, was explicitly reserved by the court. See 362 U.S. at 230, 236.

As to other types of warrantless searches authorized by *Chambers* v. *Maroney*, 399 U.S. 342 (1970); *Schmerber*

v. *California*, 384 U.S. 757 (1966); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Warden* v. *Hayden*, 387 U.S. 294 (1967)—all these involve special circumstances based on speed, *e.g.*, *Schmerber*, *Chambers*, *Warden*, or immediate self-protection. Compare *Terry* with *Sibron* v. *New York*, 392 U.S. 40 (1968), (no threat and therefore no right to frisk). No such exigency is present here. See opinion below, App. 23. Moreover, in each instance, judicial scrutiny *after* the fact was always available. Here, however, because of the secrecy of the search and the fact that it will rarely come to light, no judicial or other scrutiny is ever likely.

B. The Distinction Between Surveillance for Intelligence and Surveillance for Criminal Prosecution Is Immaterial.

The Government makes much of a purported distinction between searches for intelligence and those for law enforcement and prosecution. Indeed, its whole argument depends on that distinction (Govt. Br. 16). But nowhere in the Constitution or in case law is there any justification for such a distinction. *Totten* v. *United States*, 92 U.S. 105, 106 (1875) dealt with the powers of the Commander-in-Chief in wartime to "employ secret agents, a far cry from the President's power in peacetime to encroach upon the most fundamental rights of a free society. Indeed, in many of these cases, intelligence and prosecution merge and the only point of the distinction is that noted in the oral argument in *United States* v. *Donghi*, Cr. 1970-81 (W.D. N.Y.) *petition for mandamus pending:* when the Government can meet the probable cause requirement, it gets a warrant, and when it cannot, it relies on the so-called intelligence-gathering power. See Govt. Br. 23, urging rejection of probable cause standard for such activity.

Indeed, surveillance for intelligence purposes is even more destructive of the values of a free society than surveillance for criminal prosecution. Intelligence surveillance is an explicit fishing expedition of the 1984 variety. It intrudes upon those suspected of no wrongdoing whatsoever, see H. Schwartz, 67 Mich. L. Rev. at 468-71, and spreads an aura of Big Brotherism that no free society can tolerate. When joined with a demand for the power to engage in such intelligence surveillance without any significant outside check, the clash with individual liberty becomes intolerable.

C. The Government's Demand Is Inconsistent With Freedom of Speech and Association Protected by the First Amendment.

Not only does the Government assign too slight a weight to "the invasion which the search entails" insofar as Fourth Amendment values are concerned, but it completely omits any reference to the First Amendment values that are threatened by such surveillance. As Judge Edwards noted for the court below, App. 36-37, and as Mr. Justice Brennan demonstrated in *Marcus* v. *Search Warrant*, 367 U.S. 717, 724-29 (1961), the historical link between arbitrary searches and free speech is a close one. Since as early as 1557, not long after the invention of printing, governments have continually sought to spy upon and suppress "dangerous" speech and associations and to search out "dangerous individuals and groups." *Entick* v. *Carrington*, 19 How. St. Tr. 1029, "one of the landmarks of English liberty," 367 U.S. at 728, is one of the most significant incidents in this history, and it has many parallels in colonial history, where the hated writs of assistance gave birth to the Fourth

Amendment. Of *Entick*, the Court said in *Boyd* v. *United States*, 116 U.S. 616, 627-30:

> "The principles laid down in this opinion . . . apply to all invasions on the part of the Government and its employes of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence. . . ." 116 U.S. 627-30.

More recently, in *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965), the Court ruled that where First Amendment considerations were involved, the Fourth Amendment requirements are more stringent.

Involuntary disclosure of membership lists and other associational information can also be fatal to the equally important and related right of association, as the Supreme Court pointed out in *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

Electronic eavesdropping, particularly of the kind sought to be here legitimated, would seriously interfere with both speech and association, as the Court below found, App. 36-37, and far more than any conventional search or disclosure. Such electronic surveillance usually operates to chill free discourse and association by denying the sense of confidentiality and security that is absolutely indispensable to such discourse and association—how many will divulge a confidence critical of those in power if they know

they may be overheard? As Mr. Justice Brennan said in *Lopez*, the only way to guard privacy is "to keep one's mouth shut on all occasions" 373 U.S. at 450.

Moreover, the very publicity given to this policy, as well as the disclosure of specific applications thereof to dissenters, will chill free discourse and association even more.* Although these disclosures are of course necessary to a free society and a fair trial, the many public statements by the Government are not. See, *e.g., U.S. To Tighten Surveillance of Radicals,* N.Y. Times, April 12, 1970, §1, p. 1, col. 2; *F.B.I. Seeks Panther Data,* N.Y. Times, Dec. 14, 1969, §1, p. 1, col. 2. The many revelations as to who has been eavesdropped upon, some of which were discussed above, the broad scope of who is subject to such eavesdropping under the Government's claim, the enormous amount of eavesdropping that has gone on despite denials thereof, see, *e.g.,* Hearings Before the Senate Subcommittee on Administrative Practices and Procedures on *Invasions of Privacy by Governmental Agencies* (1965-66); see generally, H. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"* 67 Mich. L. Rev. 455, 477-80 (1969), and the fact that taps and bugs are concededly installed on non-criminal associates and on non-criminal activities, see H. Schwartz, *id.* at 469 n. 65, 470 N. 68 (testimony of F.B.I. agents)— all these factors combine to make it very dangerous indeed to risk associating with or even speaking on the phone or in a home or office to someone who may be considered "danger-

* See the awareness of this in an F.B.I. newsletter of September 16, 1970, reproduced in Donner, *Spying for the F.B.I.,* New York Review of Books, April 22, 1971, p. 31, and the intent to capitalize thereon to discourage free speech and association.

ous" by the Attorney General. As Mr. Justice Brandeis said in *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928), "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."*

III.

There is no justification for granting the Attorney General such vast unchecked powers over the lives and liberties of the American people.

A. The Government's Argument Here Is Actually the Same Argument for Inherent Powers Presented and Rejected Below; the President's Power Over Foreign Affairs Offers No Support for Its Claim.

Although the Government seeks to cast its argument in traditional Fourth Amendment language, in the last analysis its argument is really a disguised version of its argument for inherent powers pressed so vigorously and extensively below. See Govt. Br. 15-18, 31-33. Since the Government has apparently chosen to abandon this claim, there would ordinarily be no need to do more than to point to the thorough demolition of such an argument by the court below. App. 19-26.

The Government nevertheless draws on such an argument here in relying on the foreign affairs power to justify the surveillance power asserted here (Govt. Br. 29-34). Urging that no distinction can be drawn between "domestic" and "foreign" surveillance, the Government cites the con-

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* For the views of constitutional law experts on the power claimed here, see Appendix C to this brief.

tents of a sealed exhibit filed in *Ferguson* v. *United States*, No. 71-239. Govt. Br. 30 n. 13.

In the first place, it is difficult to argue the significance of records that respondents and *Amici* have never been allowed to see. The Government's characterization of such calls is obviously impossible for respondents and *Amici* to dispute, as is the significance ascribed by the Government to such characterization.

Secondly, and without passing on whether there is an exception for such surveillance for foreign-related activities, the difference between the President's powers in foreign affairs and in domestic matters is clear and long-established, as Mr. Justice Jackson stressed in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 643-44, 646 (1952). There he observed in passing that *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304 "recognized internal and external affairs as different," where inherent executive power is claimed. 635-36 n. 2. The same point is made quite decisively in *Chicago & Southern Air Lines, Inc.* v. *Waterman*, 333 U.S. 103 (1948), where the Court stressed that "the very nature of executive decisions as to *foreign policy* is political, not judicial." 333 U.S. at 111 (emphasis added). Indeed, the Court in *Waterman* expressly distinguished the President's limited power over *domestic* air routes from his plenary powers over *foreign* routes or carriers, for the very reasons set out above. *Id.* at 109-10.

Neither time nor space permits detailing the irrelevance of such of the many decisions cited by the Government. This was carefully done by Judge Edwards below at App. 21-22. See also P. Kauper, *The Steel Seizure Case: Congress and the Supreme Court*, 51 Mich. L. Rev. 141, 149-50 (1952).

Other courts have come to the same conclusion: we cannot treat our own people like foreign enemies. See, e.g., *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Calif. 1971), petition for cert. pending.

As Judge Keith said in the district court decision herein:

> "An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions. The executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because certain accused persons espouse views which are inconsistent with our present form of government.
>
> "In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of government. If democracy as we know it, and as our forefathers established it, is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of the Government' (see affidavit of Attorney General), cannot be, in and of themselves, a crime. Such attempts become criminal only where it

> can be shown that activity was/is carried on through unlawful means, such as the invasion of the rights of others by use of force or violence." App. 71.

See also Jackson, J., concurring in *Youngstown*, 343 U.S. at 649-54.

Moreover, the distinction between foreign and domestic surveillance has been drawn steadily by the Government itself in its own affidavits. In the case at bar as well as in the Chicago conspiracy case, *United States* v. *Dellinger, et al.*, Crim. 69-18, N.D. Ill., decided Feb. 20, 1970, for example, the Attorney General's affidavits expressly referred to "domestic security." In the Jewish Defense League case, *United States* v. *Bieber*, Crim. 71-479 (E.D.N.Y.), and in *United States* v. *Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd on another issue*, 403 U.S. 698 (1971), the affidavits spoke of "foreign" problems. And as the Government implicitly concedes, §2511(3) seems to draw such a distinction. Why then is it so unreal?

The distinction was apparently easy enough to draw for the distinguished and experienced lawyers who constituted the members of the American Bar Association Minimum Standards Committee on Electronic Surveillance and the ABA House of Delegates. The ABA Minimum Standards for Electronic Surveillance adopted by that body February 1971 do *not* include the power sought by the Government herein to eavesdrop on *domestic* security, despite the explicit intent to track the federal statute very closely. See Introduction to Standards, p. 1. The right to dispense with judicial authorization approved by these standards in national security cases relates solely to *foreign* matters, see §3.1, and even this authority was sharply challenged. See 8 CrL 2371-72 (2-17-71).

In floor debate, Mr. Justice Powell, then a private citizen and a member of the Special Committee on Standards for the Administration of Criminal Justice that recommended these Standards, expressly stated that the exemption from antecedent judicial scrutiny does not apply to domestic subversion, but only to foreign attack. 8 CrL 2372.

This deliberate omission of the power to eavesdrop on domestic individuals and groups indicates that the ABA House of Delegates believes that the President should not have such authority. This omission is particularly significant in light of the relatively sympathetic attitude toward governmental eavesdropping reflected in the Standards and Commentary, both in the final version and in the Tentative Draft of June, 1968.

There are some fundamental reasons for the distinction. Domestic individuals and groups owe this nation loyalty and allegiance, in return for which they are entitled to the full measure of liberty that constituted the *raison d'être* for this nation's creation. A foreign group or national neither owes this nation that allegiance, nor are they usually given the full benefit of the nation's bounty.

Moreover, much of the eavesdropping in the international area probably has little to do with threats to this nation, but is designed more to provide data for informal policymaking than to counter dangerous attack.

Indeed, even for foreign enemies, we have statutes and due process, and any electronic eavesdropping for such purposes must comply with the detailed structure of 18 U.S.C. §2500. See 18 U.S.C. §2511(2). Only where we deal with the *non-criminal array* of foreign policy activities—

and inevitably, most foreign policy activities do *not* involve criminal implications—can even a colorable case be made for some kind of intelligence-oriented surveillance. Where domestic activities involving potential law-breaking are concerned, the Constitution must be observed.

B. There Is No Statutory Authority for This Power.

In the first place, as the court below concluded, App. 28-33, Congress gave no statutory authority to exercise such surveillance, even if it constitutionally could do so. Section 2511(3) of the Act merely reads:

> "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means or against any other clear and present danger to the structure or existence of the Government. . . ."

The Senate Report at one point refers to this power as if it encompassed only foreign-related activities, see S. Rep. No. 1097, 90th Cong., 2d Sess. 69 (1968), although the detailed analysis of the report is more ambiguous. *Id.* at 94. See discussion at pp. 36-37 below. But on the floor of the Senate, it was made clear in response to Senator Hart that no extraordinary additional powers were given or even acknowledged:

> "Mr. Holland . . . We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such powers as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be

concerned. *We certainly do not grant him a thing.* There is nothing affirmative in this statement." 118 Cong. Rec. 14751 (May 23, 1968) (emphasis added).

And Senator Hart thereupon concluded:

"A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security powers under present law, which I have always found extremely vague, especially in domestic security threats, as opposed to threats from foreign powers. As I recall, in the recent *Katz* case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III. *As a result of this exchange, I am now sure no President thinks that just because some political movement in this country is giving him fits, he could read this as an agreement from us that by his own motion, he could put a tap on.*" (Emphasis added.) *Ibid.*

More recently, Senator McClellan, perhaps the prime mover behind 18 U.S.C. §2500 et seq. expressed virtually

the same position. In presenting the report of the Administrative Office of the United States Courts on the 1970 court-ordered electronic surveillances he declared with respect to "the so-called national security or domestic security use of wiretaps or listening devices," and the President's power thereon:

> "What the scope of the President's constitutional powers is in this area is a question the Congress did not reach in 1968, and which is, I note, now in the lower Federal courts winding its way up to the Supreme Court. See *United States* v. *Keith,* No. 71-1105 U.S. Court of Appeals for the Sixth Circuit, decided April 3, 1971." 117 Cong. Rec. 6477. (May 10, 1971 daily ed.)

Moreover, throughout the 1950's, Congress *refused* this power despite repeated requests. See Theoharis and Meyer, *The National Security Justification for Electronic Eavesdropping: An Elusive Exception,* 14 Wayne L. Rev. 749, 764-65 (1968). When it did legislate, it did so in the most limited way possible: it said simply that whatever the President's powers were, they remained unaffected. As the Sixth Circuit concluded, the language "is not the language used for a grant of power. On the contrary, it was in our opinion clearly designed to place Congress in a completely neutral position in the very controversy with which this case is concerned." App. 33.

The Government seeks support for its position in a rather cryptic page from the Senate Committee Report, S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968) (Govt. Br. 28-29). That page reads:

> "These provisions of the proposed chapter regarding national and internal security thus provide that

the contents of any wire or oral communication intercepted by the authority of the President may be received into evidence in any judicial trial or administrative hearing. * * * The only limitations recognized on this use is that the interceptions be deemed reasonable based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (Carroll v. United States, 267 U.S. 132 (1925)). The possibility that a judicial authorization for the interception could or could not have been obtained under the proposed chapter would only be one factor in such a judgment. No preference should be given to either alternative, since this would tend to limit the very power that this provision recognizes is not to be deemed disturbed."

But in *Carroll,* the Court *insisted* on probable cause, 267 U.S. at 155-56, a prerequisite which the Government strenuously rejects here. Govt. Br. 23.

And at another point in the Senate Report, when the Committee sets out the justification and scope of the legislation, the Committee said:

"NATIONAL SECURITY

It is obvious that whatever means are necessary should and must be taken to protect the national security interest. *Wiretapping and electronic surveillance techniques are proper means for the acquisition of counterintelligence against the hostile action of foreign powers.* Nothing in the proposed legislation seeks to disturb the power of the President to act in this

area. *Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.*" S. Rep. No. 1097 at 69 (emphasis added).

Surely, if Congress was going to approve so major a departure from established constitutional principle in so sensitive an area, it would have done so in a clear and unambiguous manner.

C. Presidential Directives Cannot and Do Not Authorize This Power.

The Government also seeks to bootstrap its way by claiming that Presidential directives authorize such a power (Memo 3-4). But as Judge Ferguson pointed out in *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Calif. 1971), *petition for cert. pending*, No. 71-239, and as Judge Keith agreed in the district court decision herein, App. 70-71, this was to be a narrowly circumscribed power, and in President Roosevelt's letter, was to be used only against *aliens*, so far as possible. The Court of Appeals below did not even discuss this contention.

Moreover, this kind of bootstrapping argument is dubious, to say the least, under the special facts of this case. The history of the 34 years between the Communications Act of 1934 and the Omnibus Crime Control Act of 1968 shows continuing controversy and impasse over the proper scope of electronic surveillance. See H. Schwartz, 67 Mich. L. Rev. at 455, especially 455 n. 1; Theoharis and Meyer, 14 Wayne L. Rev. at 755-68. Moreover, this seems to be the first time that the Government has openly proclaimed the right to use electronic surveillance on domestically "dangerous" individuals and groups. To conclude that by not

stopping it, Congress intended to ratify the legitimacy of a policy about which few, if any, knew, is to stretch the generally dubious doctrine of ratification by silence, into fantasy.

Finally, even if one takes the administrative directives for all they are worth, they do not necessarily authorize electronic surveillance *without judicial scrutiny.* Since there was no provision for such scrutiny under §605 of the Communications Act, none was possible. One thus cannot know whether either President Roosevelt or his successors would have authorized such exclusively executive action, had there been an opportunity for judicially supervised eavesdropping, as there now is under 18 U.S.C. §2500.

D. Practical Considerations of Competency, Confidentiality and Utility Do Not Justify Granting the Attorney General This Power.

The Government has not only understated the value of the interests jeopardized by its demand, but it has grossly overstated the considerations on the other side. These come down to the following:

1. The relevance of the President's constitutional obligation to protect this nation;
2. The comparative competence and reliability of the executive and judicial branches;
3. The practical benefits and detriments from granting such a power to the Attorney General.

1. The president's obligation to defend the nation does not justify wholesale invasion of individual liberty by the Attorney General.

Obviously, the president has the obligation to defend the nation, and equally obviously, he must have the power to obtain information. But such an obligation and power are the barest beginning of analysis. It certainly does not imply anything about what methods may be used, especially those that conflict with the most cherished values of our nation. Nor does it imply anything about giving that power completely to the nation's chief prosecutor, who is not politically responsible and who is subject to all the shortcomings classically described by Mr. Justice Jackson in *Johnson* v. *United States,* 333 U.S. 10, 13-14, and most recently noted in *Coolidge* v. *New Hampshire,* 403 U.S. at 449-51.

2. The Attorney General is no more competent or trustworthy than the courts in determining when and whether electronic surveillance should be permitted.

Much of the Government's brief is devoted to the thesis that the Courts are not competent to evaluate the determination of when a particular surveillance should be undertaken. In the court below, the Government justifred this on the ground that many considerations, some not primarily of a factual nature, are relevant. In this Court, the Government has virtually abandoned that notion and restricts itself to the related but separate considerations of secrecy and competency.

As to the first, the Government talks mysteriously of material that cannot be disclosed to a court. Govt. Br. 24.

But this is true of every criminal investigation and prosecution. No one requires the Attorney General to submit all of his facts, and he never does—after all, there are often criminal prosecutions for the threats to security for which the Attorney General seeks this authority, and somehow these are instituted without disclosing everything. Indeed, most federal court-ordered surveillance is allegedly for investigating large-scale complex conspiracies involved in organized crime, see S. Rep. No. 1097 at 70-74, and involve much more than the "small number of single facts" asserted by the Government to make up the typical search warrant situation. Govt. Br. 24.

The Government argues that:

> "Disclosure of the reasons for a surveillance or even that it is to be conducted could, because of the sensitive nature of the information sought and of most surveillance targets, make an effective surveillance impossible and thus prevent the government from obtaining vital information." Govt. Br. 24-25.

Does the Attorney General not trust the federal judiciary (which includes many former United States Attorneys) to keep such applications secret, as they are required to do under 18 U.S.C. §2518(8)? After all, it is not the courts that have leaked stories about the wiretapping of Martin Luther King, see Navasky, KENNEDY JUSTICE 35 (1971), or Joe Namath. Moreover, there will be no "disclosure of the reasons for a surveillance or even that it is to be conducted," Govt. Br. 23, since the proceedings are *in camera* until after criminal prosecution is started, or the eavesdropping is otherwise completed. Also, other methods to ensure confidentiality are available, such as an appli-

cation to the Chief Judge of the Court of Appeals. See Opinion below, App. 38.

And the concern is really baseless. Over 15 years ago, former Brooklyn District Attorney Edward Silver denied the need for any exemption from judicial scrutiny for fear of judicial disclosure, while supporting wiretapping authority in general. See Hearings on Wiretapping Before Subcommittee No. 5 of the House Committee on the Judiciary, 84th Cong., 1st Sess., 98 (1955). Judge Silver spoke from long experience since he has been obtaining eavesdropping orders from New York judges for many years. See also Donnelly, *Comments and Caveats About the Wire Tapping Controversy,* 63 Yale L. J. 799, 809 (1954).

3. "Centralization" and "uniformity" are not sufficient to outweigh the potential and actual harm from the widespread electronic surveillance actually engaged in by the executive.

Most of the arguments for the Government's position prior to this series of cases have focused on the need to ensure "centralization" and "uniformity," see Brownell, *The Public Security and Wiretapping,* 39 Corn. L. Q. 195, 210-11 (1954); Rogers, *The Case for Wiretapping,* 62 Yale L. J. 792, 797-98 (1954). It is difficult to believe that such administrative considerations could possibly outweigh the great threat to individual liberty presented by the power sought by the Government.

Moreover, the uniformity seems illusory. Attorneys General shift in both policy and attitude far more than do the courts, where there is life tenure. See generally Donnelly, 63 Yale L. J. at 809.

IV.

Alderman v. *United States*, 394 U.S. 165, is a constitutional decision and should not be overruled.

A. *Alderman* Should Not Be Overruled.

The reasoning of Mr. Justice White in *Alderman* is so cogent that *Amici* will not argue this point.

B. *Alderman* Is a Constitutional Decision.

The Government seeks to argue that *Alderman* is not a constitutional decision, but merely "supervisory." Govt. Br. 40. This contention is both simplistic and wrong, as can be seen from both the language of *Alderman* and later cases and an analysis of "supervisory power" theory.

1. *The* Alderman *language.*

In the first place, the Court's language in *Alderman* makes it clear that Fourth Amendment rights cannot be adequately protected if the issue of relevancy is left to the judge for an *in camera* determination. This language is very strong indeed, as the following excerpt shows:

> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U.S. at 184.

This one sentence alone makes it indisputable that the Court did not think it was dealing with a mere procedural

detail which could easily be dispensed with—the Court was trying to ensure that "these crucial hearings are to be more than a formality and [that] petitioners [are] not left entirely to reliance on government testimony . . . ." 394 U.S. at 183. The *Alderman* procedure is thus one "which the Fourth Amendment exclusionary rule *demands*." *Id.* at 184 (emphasis added).

But we have more than this language in *Alderman*. Two weeks later, when the Court reaffirmed its position in *Alderman*, it again made it clear that *Alderman* was constitutional doctrine. In *Taglianetti* v. *United States*, 394 U.S. 316, it distinguished the issues of legality and standing, where disclosure is not required, from the relevancy issue, on the ground that

> "the in camera procedures at issue there [*Alderman*] would have been an inadequate means to safeguard a defendant's Fourth Amendment rights." 394 U.S. at 317.

This language, which echoes the language of *Mapp* v. *Ohio* itself when the Court adopted the exclusionary rule, 367 U.S. 643, 652-53 (1961) ("other remedies have been worthless and futile") makes clear that the very viability of the Fourth Amendment is at stake.

Indeed, the argument that only the supervisory power is involved was once made with respect to the exclusionary rule itself, see *Mapp* v. *Ohio*, 367 U.S. at 649. The argument was of course rejected there, and its treatment here should be similar and for the same reason: nothing else will do to protect Fourth Amendment rights.

2. The "supervisory power."

The Government Brief refers to the "supervisory power" as if it were totally separate from constitutional considerations. Such an approach is simplistic and wrong. Calling something an exercise of the "supervisory power" does not imply that it can be dispensed with easily, or that it is in some sense unimportant. The so-called "supervisory power" is often invoked in order to avoid having to decide a constitutional question, and not to decide, by implication or directly, that the resulting rule is in fact not a constitutional requirement. For example, the rule of *Cheff* v. *Schnackenberg,* 384 U.S. 373, 380 (1966) that a jury trial is required for a criminal contempt penalty of more than six months, was established "in the exercise of the Court's supervisory power." Two years later, however, it was in effect followed in *Bloom* v. *Illinois,* 391 U.S. 194 (1968), where a somewhat similar rule was applied to states on constitutional grounds. See also *McCarthy* v. *United States,* 394 U.S. 459 (1969) and *Boykin* v. *Alabama,* 395 U.S. 238 (1969).

Indeed, even in what remains a supervisory power situation, *Jencks* v. *United States,* 353 U.S. 657 (1957), Mr. Justice Brennan, who wrote for the Court in *Jencks,* subsequently noted that "it is true that our holding in *Jencks* was not put on constitutional grounds, *for it did not have to be;* but it would be idle to say that the commands of the Constitution were not close to the surface of the decision." *Palermo* v. *United States,* 360 U.S. 343, 362-63 (1959) (Brennan, J. concurring) (emphasis added).

The central issue is really not whether the ruling is labeled "supervisory" or "constitutional." Rather, as Professor Alfred Hill put it in his penetrating article, *The Bill of Rights and the Supervisory Power,* 69 Colum. L. Rev.

181, 191 (1969), the real issue is whether the rule in question is necessary to avoid "materially diminish[ing] the effectiveness of the implementation that is constitutionally mandated." Some rules are, and some are not. The language quoted from both *Alderman* and *Taglianetti* expressly state that, as the Court put it in the latter case, "in camera procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights."

3. *Relevancy, standing and legality.*

As the Court pointed out in *Taglianetti,* this is not to say that "an adversary proceeding and full disclosure [are required] for resolution of every issue raised by an electronic surveillance." Standing, legality, voice identification—none of these really requires the same kind of informed analysis of specific conversations that relevancy and taint do. In some cases, deciding legality may not really require anything more than analysis of the basis on which the eavesdropping was authorized; any other contentions, such as that the eavesdropping exceeded the authority as to time, place or person, can usually be determined *in camera,* although even here an adversary proceeding would seem at least useful. Asserting standing will usually require even less of a detailed knowledge of what was overheard, especially in view of the restrictive standing rules in *Alderman* limiting standing to one whose conversations were overheard, or on whose premises such surveillance occurred. Both can simply be alleged and the Court can check, *in camera,* for as the Court indicated in *Taglianetti,* it is not true here "that 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court.'"

In contrast, the Court in *Alderman* stressed why *in camera* procedures were inadequate. The problem is even more acute than the Court indicated, where electronic eavesdropping is concerned: the tapes are rarely introduced in evidence and are used almost exclusively for leads. Moreover, much of this eavesdropping is explicitly for "intelligence," the relevancy of which to any specific crime is often well below the surface. Thus, unlike these other issues, the relevancy issue where electronic eavesdropping is concerned is not only complex but exceptionally difficult and generally present.

CONCLUSION

The Government cites *United States* v. *Robel,* 389 U.S. 258, 267 (1967) for the proposition that "the Constitution has never been read as depriving the Government of the power to protect itself against subversion." But as Judge Edwards quoted Benjamin Franklin:

> "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

Moreover, the true significance of *Robel,* which struck down a ban on employment of Communists, is Chief Justice Warren's oft-quoted comment that the

> "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Consti-

tution, and the most cherished of those ideals have found expression in the First Amendment. *It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.*" 389 U.S. at 264.

This case tests the question of whether the rule of law is to be imposed on all officials, high and low. As Mr. Justice Brandeis said in *Olmstead*:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." 277 U.S. at 485.

Respectfully submitted,

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Buffalo, New York 14202

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APPENDIX A

Statutes

18 U.S.C. §2518(1)(c)

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

• • • • •

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

• • • • •

18 U.S.C. §2518(7)

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national se-

curity interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

APPENDIX B

Department of Justice—Senator Kennedy Correspondence

(Letterhead of United States Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, Washington, D. C. 20510)

February 5, 1971

Honorable John Mitchell
Office of the Attorney General
Department of Justice
Washington, D.C.

Dear Mr. Attorney General:

As you know, the Subcommittee on Administrative Practice and Procedure has in recent years been extremely interested in the subject of electronic surveillance, both in connection with its continuing study of practices of federal agencies and others that may constitute invasions of privacy and its role in the development and processing of the legislation which eventually became Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Both of your immediate predecessors and other Department officials appeared before the Subcommittee and their assistance was extremely valuable in our work. I know that your knowledge and interest in this area will also prove helpful to us, and we look forward to working closely with you and your staff.

There has been increasing concern in the Congress and in the Nation in regard to the current practices of the

Federal government in the utilization of electronic surveillance. You yourself have announced a six-fold rise in the number of court-ordered wiretaps and microphone eavesdrop installations between calendar 1969 and calendar 1970, and there have been a growing number of court cases involving surveillances initiated by the Federal government without court orders. You have offered detailed and impressive defenses of the increase in installations under court order, and, of course, we will be assisted in reaching our own conclusions as to that type by the annual reports of the Department on its applications to the courts for wiretap and eavesdrop orders.

In the case of electronic surveillance installations made without court orders, the public impression is that such installations are not only being made more frequently, but also that they are being used in a growing spectrum of types of cases. Many citizens fear that installations without court order are being used to avoid the requirements governing court-ordered installations, and especially the necessity for the government to prove probable cause as to commission of specified criminal offenses to obtain a court order. They reason that if there were facts to establish that such criminal offenses were involved in a given case, the government would proceed by court order, and that the increasing avoidance of this procedure reflects increasing surveillance of individuals and groups whose only offense is disagreement with government policies, personal eccentricity, outspokenness, or participation in lawful activities of organized dissent, or a combination of these.

The problem for those of us who must assess these concerns is that in the field of purely Executive wiretapping and eavesdropping, as opposed to Executive tapping and bugging under Judicial authority, we have scant information on which to base our judgments. The Director of the Federal Bureau of Investigation has annually testified as to the number of "national security" installations, and other Department officials including the Attorney General have from time to time also referred to such a figure in Congressional testimony or correspondence. I believe that the most recent such report referred to 36 wiretaps and 2 microphones.

In view of your own statements as to the increased number of non-court-ordered installations, the growing public concern, the need of the Congress and the public for more information from which to determine whether and how the limitations on such installations in Section 2511(3) of Title III are being adhered to, Constitutional questions aside, I am confident that you will agree that this would be an opportune time to shed some light on Federal practices in this area.

Would you, therefore, kindly provide the following information as soon as possible, sending us immediately those items of information which are readily available, and the remainder when obtained. I recognize the fact that some of the statistics requested will be based on documents which are classified, but the requests have been phrased so as to admit of answers which should be able to be unclassified. However, if you see a need to classify any particular answer, please provide it separately, and it will be handled on a classified basis.

A. For the period June 19, 1968 to December 31, 1968, for calendar 1969, and for calendar 1970, please provide:

1. The number of electronic surveillance installations placed in operation or continuing in operation at any time during the period, counting each device, connection, or other unit as a separate installation where more than one installation was utilized to surveil the same subject or group of subjects.

2. Of these, for each period the number of each type of installation, i.e. wire communication intercepts, oral communication intercepts, combination intercepts, or other.

3. For each period, the number of installations in each of the following time categories: under 1 week, 1 week to 1 month, 1 month to six months, over six months.

4. For each period, the number of installations in each use category itemized in Section 2511(3) of Title 18, U.S. Code, as added by Title III of P.L. 90-351, i.e.

a. to protect the Nation against actual or potential attack or other hostile acts of a foreign power,

b. to obtain foreign intelligence information,

c. to protect national security information against foreign intelligence activities,

d. to protect against the overthrow of the government by force or other unlawful means,

e. to protect against other clear and present danger to the structure or existence of government (for this category, describe general nature of danger).

5. For each period, the number of installations the dissemination of whose product fell in each of the following categories:

a. disseminated only to 5 or fewer persons within the Federal government,

b. disseminated only to 5 to 50 persons within the Federal government,

c. disseminated to over 50 persons in the Federal government only,

d. dissemination total unknown but available on request to properly cleared Federal employees only,

e. disseminated to state, local, or private agencies.

B. In the light of the recent conflicts among the Federal courts as to the Constitutional and statutory limits of the government's power to initiate electronic surveillance without judicial authority, what interim standards and procedures has the Department adopted pending ultimate determination of these limits on a nation-wide basis?

I appreciate your assistance and look forward to your reply.

Sincerely,

Edward M. Kennedy
Chairman
Subcommittee on Administrative
Practice and Procedure

THE ATTORNEY GENERAL
WASHINGTON

February 16, 1971

Honorable Edward M. Kennedy, Chairman
Subcommittee on Administrative
Practice and Procedure
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to acknowledge receipt of your letter of February 5, 1971, relating to the subject of electronic surveillance. Response to your requests will be made as soon as the appropriate material can be compiled and considered.

Sincerely,

/s/ JOHN N. MITCHELL
John N. Mitchell

JNM:skm

ASSISTANT ATTORNEY GENERAL
INTERNAL SECURITY DIVISION

DEPARTMENT OF JUSTICE
WASHINGTON

March 1, 1971

Honorable Edward M. Kennedy
Chairman
Subcommittee on Administrative
Practice and Procedure
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Attorney General has asked me to respond to your inquiry of February 5, 1971, with respect to administrative practices and procedures relative to electronic surveillance.

In accordance with your suggestion, we would ask that the breakdowns furnished with respect to the duration of surveillance be treated as confidential since an examination of the breakdown might indicate a fixed number of permanent surveillances.

With respect to your questions A1, A2, and A3, we submit the following:

June 19 to December 31, 1968

Telephone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	50

Microphone Surveillances

In operation less than one week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	6

Calendar Year 1969

Telephone Surveillances

In operation less than 1 week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	81

Microphone Surveillances

In operation less than 1 week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	13

Calendar Year 1970

Telephone Surveillances

In operation less than 1 week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	97

Microphone Surveillances

In operation less than 1 week	
In operation 1 week to 1 month	
In operation 1 to 6 months	
In operation more than 6 months	
TOTAL	16

The annual totals set forth above can be misleading in that they reflect the total installations authorized or in place during the periods described. The total maximum number of surveillances in operation at any one time during the periods described are as follows:

June 19 to December 31, 1968

Telephone Surveillances	45
Microphone Surveillances	6

Calendar Year 1969

Telephone Surveillances	59
Microphone Surveillances	5

Calendar Year 1970

Telephone Surveillances	56
Microphone Surveillances	6

With respect to your question A4, the installations cannot be categorized exclusively under a single criterion; however, each installation meets one or more of the criteria itemized in Section 2511(3) under Title 18 of the United States Code.

Departmental records do not, as a practical matter, permit us to answer question A5 with the specificity you request.

However, Department policy limits dissemination of information of the nature inquired of to persons on an actual "need to know" basis. Appropriate security classifications and control markings are imposed on such information. None of this information is disseminated to state or local governments or agencies except in rare instances in order to prevent the commission of a serious felonious act. In such instances, the source of the information is not divulged.

In response to question B, we would advise that since the *Katz* decision in 1967, the Department has operated under the more restrictive guidelines dictated by that decision and the standards enunciated in the Omnibus Crime Control and Safe Streets Act of 1968, which codified the parameters of the "national security" exception. No changes in Department practices or procedures have been initiated by reason of the conflict in the recent district court decisions to which you refer.

Sincerely yours,

/s/ ROBERT C. MARDIAN
Robert C. Mardian
Assistant Attorney General

(Letterhead of United States Senate, Committee on the Judiciary, Washington, D.C. 20510.)

March 12, 1971

Mr. Robert C. Mardian
Assistant Attorney General
Department of Justice
Constitution Avenue and
Tenth Street, N.W.
Washington, D.C. 20530

Dear Mr. Mardian:

Thank you for your letter of March 1 replying to some of my inquiries relating to electronic surveillance.

Although I can appreciate that each of the surveillances operated without court order may not necessarily be susceptible of categorization exclusively under any single criterion enumerated in Section 2511 (3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, we would nevertheless like to have a numerical break-down by category or categories of the installations described in your letter. In this regard, we would also appreciate your supplying us with a detailed description of the administrative practices and procedures of your Department which culminate in a determination whether Section 2511 (3) criteria have been met and whether a recommended surveillance should be approved.

I appreciate your assistance.

Sincerely,

/s/ Edward M. Kennedy
Edward M. Kennedy

(Letterhead of Department of Justice, Washington 20530, Assistant Attorney General, Internal Security Division)

March 23, 1971

Honorable Edward M. Kennedy
Chairman
Subcommittee on Administrative
Practice and Procedure
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As indicated to you in my letter of March 1, 1971, the subject matter of question A-4 is such as to preclude categorization under a single criterion and no such categorization exists.

I am unable to supply you with a "detailed description of the administrative practices and procedures" you request, other than to say that all requests for telephonic and microphonic surveillances, at least since January 20, 1969, to the Attorney General have come from the Director of the Federal Bureau of Investigation personally. Such requests are handled exclusively by the Attorney General acting for the President of the United States.

This Department has heretofore publicly set forth the considerations involved in making such determinations and the reasons for refusing to disclose the bases for the Executive's decision. In the brief of the United States filed recently in the Ninth Circuit Court of Appeals we said:

"In authorizing the use of electronic surveillance, the President through the Attorney General must weigh

many factors, not all of a purely factual nature, which he cannot, and should not be required to, produce before a magistrate. Moreover, in making such a decision the President must rely upon the entire spectrum of information available only to him, much of which is derived from sources which, by their nature, are secret. Such information, more often than not, involves both the Nation's foreign and domestic affairs inextricably intertwined. Any attempt to legally distinguish the impact of foreign affairs matters from internal subversive activities or to isolate one particular factor upon which an eventual decision is based, is an exercise in futility and eloquently demonstrates the wisdom of leaving these decisions to the Chief Executive who alone is in a position to make such a judgment and who is answerable to the people from whom the power is derived.

Another weighty factor bearing upon this issue is the fact that disclosure of the bases for the Attorney General's decision or the fact that such a surveillance is to be conducted may in itself prejudice the national interest."

We hope the foregoing will be of assistance to you.

Very truly yours,

/s/ ROBERT C. MARDIAN
Robert C. Mardian
Assistant Attorney General

April 1, 1971

Mr. Robert C. Mardian
Assistant Attorney General
Internal Security Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Mardian:

I am writing with reference to your letter of March 23 advising that there is no categorization of the surveillances operated without court order under the criteria enumerated in Section 2511(3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

In view of the position taken by your Department in the courts that certain of such surveillances are employed for the purpose of gathering "foreign intelligence information", and that other of such surveillances are employed for the purpose of gathering "intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government", would you please provide us with a numerical break-down of the installations described in your March 1 letter under these two classifications.

I appreciate your assistance.

Sincerely,

Edward M. Kennedy
Chairman
Subcommittee on
Administrative Practice
and Procedure

DEPARTMENT OF JUSTICE
WASHINGTON

ASSISTANT ATTORNEY GENERAL
INTERNAL SECURITY DIVISION

April 23, 1971

Honorable Edward M. Kennedy
Chairman
Subcommittee on Administrative
Practice and Procedure
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your most recent letter of April 1, 1971, in which you request a numerical breakdown of those surveillances operated without court order, which are employed for the purpose of gathering "foreign intelligence information" and those which are employed for the purpose of gathering "intelligence information deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of the government." You indicate that these two categories are derived from the position recently taken in the courts by the Department of Justice.

The position taken by the Department in the courts has drawn a distinction between two separate but closely related powers of the President, pursuant to which he may constitutionally authorize electronic surveillance to gather intelligence information without securing a prior warrant. In the brief of the United States filed recently in the Ninth Circuit Court of Appeals we said:

In *United States* v. *Belmont,* 301 U.S. 324, 328 (1937), the Court recognized the existence and extent of one of these inherent Presidential powers when it held that "the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this power [is] not subject to judicial inquiry or decision." . . . the President, in his dual role as Commander in Chief of the armed forces and Chief Executive, possesses another serious power and responsibility—that of safeguarding the security of the Nation against those who would subvert the Government by unlawful means. (Brief, pages 2-3).

As we have indicated, the inherent powers of the Chief Executive to conduct foreign affairs and to protect the national security, while somewhat related, are separate and distinct. The Congress itself recognized the distinction in the Omnibus Crime Control and Safe Streets Act of 1968. (Brief, pages 17-18).

This position was not intended to imply that any single surveillance could be considered as being employed solely pursuant to either one of the aforementioned powers. As I have indicated previously, the decision to employ such surveillance is based on a consideration of information involving "both the Nation's foreign and domestic affairs inextricably intertwined." Accordingly, the Department has never attempted such a categorization.

We hope the foregoing will be of some assistance.

Sincerely,

/s/ ROBERT C. MARDIAN
Robert C. Mardian
Assistant Attorney General

APPENDIX C

Letter to Hon. John N. Mitchell from Constitutional Law Experts

June 20, 1969

The Honorable John N. Mitchell
The Attorney General
of the United States
The Department of Justice
Washington, D.C.

Dear General Mitchell:

The New York Times recently reported that the Justice Department claims that it may wiretap and bug domestic groups which seek "to attack and subvert the Government by unlawful means," free from judicial supervision. To grant such a claim would gravely threaten some of our most fundamental liberties as well as the rule of law itself. Today, both liberty and law are undergoing tests as severe as any in our history, and this claim by an agency charged with furthering these values, can only make their defense even more difficult. Nor is such authority even necessary, given the unprecedentedly broad powers recently granted the Government with respect to electronic eavesdropping, and domestic subversion and disorder.

Electronic bugging and wiretapping are so dangerous to privacy, freedom of speech and freedom of assembly that until just a few years ago, few were willing even to consider granting such powers except for the most serious

offenses like espionage, treason, kidnapping, and murder. Now, of course, the Omnibus Crime Control and Safe Streets Act of 1968 permits this device for a broad range of offenses, though generally under court supervision. And though an argument can be made for an exemption from judicial scrutiny for eavesdropping in foreign affairs—as to which we take no position except to note that the Supreme Court's opinion in *Katz* v. *United States* expressly left this question open—we firmly condemn this attempt to obtain such absolute power against our own people in domestic affairs.

The Founding Fathers, who were not unacquainted with domestic threats and disorders of the most serious nature, understood that no one can be trusted with unchecked power over the lives and effects of other men. This insight was incorporated into the Fourth Amendment, with its provision for judicial controls over official searches and seizures. Today, electronic devices are infinitely more intrusive, invisible and dangerous. To accept the Department's claim of non-reviewable discretion in the use of such devices, to agree that only "the executive and not the judicial branch" has the "competence" to determine whether "it is appropriate to utilize electronic surveillance" of domestic groups, is to repudiate one of our oldest and most vital traditions. Why indeed is the Department unwilling to submit itself to judicial oversight? The proceedings are *ex parte* and can remain confidential as long as necessary, and the federal judiciary has an unblemished record for maintaining such confidentiality.

The argument that Big Brother knows best has been steadily invoked in order to resist the application of many other provisions of the Bill of Rights, and it has consis-

tently been rejected. As was pointed out by Justice Robert H. Jackson, a man whose Nuremberg experience had taught him much about a police state and yet one who was no friend of disorder, "The point of the Fourth Amendment, which often is not grasped by zealous officers, is . . . that its protection consists in requiring that those [normal inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. U.S., 333 U.S. 10, 14 (1948).

Nor can we ignore the fact that the power sought to be legitimated by the Department was used not only against five political dissenters who are defendants in the Chicago conspiracy, but against one of the most revered leaders of our time, Martin Luther King, Jr., even after President Johnson ordered cessation of all eavesdropping. Surely there can be no more conclusive—or sad—demonstration of how dubious is the "competence" of these "men of zeal, well-meaning but without understanding," to use Justice Brandeis' words. If Martin Luther King, Jr., the Black Muslim Leader Elijah Muhammed, and vigorous opponents of the Vietnam war are considered appropriate subjects for such gross violations of their rights, which group vigorously seeking change, whether radical, liberal or conservative, is safe?

Finally, it was reported that the Department says it needs such authority "to gather intelligence information concerning those organizations which are committed to the use of illegal methods to bring about changes in our form of government and which may be seeking to foment violent disorders." But such authority appears to be in conflict with §2516 (1)(a), (g) of Title III of the Crime

Control Act which seems to require that application be made to a court for authority to use electronic surveillance to obtain evidence of offenses under Ch. 115 of the United States Criminal Code (Treason, Sedition and Subversive Activities) and Ch. 102 (Riots), as well as for evidence of a conspiracy to commit any such offense, precisely the crimes for which the Department is seeking the authority to eavesdrop *without* judicial supervision.

Forty years ago, Justice Brandeis warned that "our Government is the potent, the omnipresent teacher . . . . If the Government becomes a law breaker, it breeds contempt for law; it invites every man to be a law unto himself." At commencements throughout the nation these past weeks, students have charged their elders with hypocrisy and worse for urging them to stay within the limits of the law in seeking to achieve their goals. If the Department of Justice, whose primary task it is to defend and further liberty and the rule of law, does not abandon its claim, it will then be difficult indeed to deny the youthful indictment. The Government has confessed error before in the interests of justice, and we call upon it to do so again in this instance.

Yours very truly,

ANTHONY G. AMSTERDAM
Professor of Law
University of Pennsylvania
Law School

VERN COUNTRYMAN
Professor of Law
Harvard University
Law School

NORMAN DORSEN
Professor of Law
New York University
School of Law

STEVEN B. DUKE
Professor of Law
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GERALD GUNTHER
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MICHAEL S. JOSEPHSON
Assistant Professor of Law
Wayne State University
Law School

EDMUND W. KITCH
Associate Professor of Law
University of Chicago
Law School

HERMAN SCHWARTZ
Professor of Law
State University of New York
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ALAN WESTIN
Professor of Public Law
and Government
Columbia University